TAN SRI RAJA KHALID RAJA HARUN

v.

THE INSPECTOR-GENERAL OF POLICE

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING MOTION NO. R8-32-14-87]
30 OCTOBER 1987

ADMINISTRATIVE LAW**:** *Habeas corpus - Detention under s. 73(3)(a) Internal Security Act 1960 (ISA) - Grounds of arrest - Whether applicant acted in a manner prejudicial to security of country - Question of evidence - Threat to security must relate to past acts.*

EVIDENCE: *Burden of proof - Effect of provision of s. 73(7) of ISA - Whether burden shifts to applicant to show detention is unlawful.*

CIVIL PROCEDURE: *Jurisdiction - Judicial review - Court's jurisdiction to issue writ of habeas corpus - Exercise of power of detention under statute - Whether subject to judicial review - To ensure scope and limits of power were not exceeded - Purpose of s. 8 of ISA - To detain person to prevent him from acting in a manner prejudicial to security of Malaysia - Whether any evidence to the effect.*

This was an application by the applicant for a writ of *habeas corpus* against his detention under the Internal Security Act 1960.

The applicant was arrested on 13 January 1987 at about 11.00 a.m. by a deputy superintendent of police from the special branch of police headquarters, Bukit Aman at his office under s. 73(1) of the Internal Security Act and subsequently detained under s. 73(3)(a) and (b) of the same Act.

Held:

[1] The provision of s. 73(7) of the Internal Security Act does not mean a complete ouster of the Court's jurisdiction to issue a writ of *habeas corpus* because it is settled law that any exercise of power under a statute is subject to judicial review to ensure that the scope and limits of the power were not exceeded.

[2] On the facts of this case it is for the respondent to show that he has not exceeded his power under s. 73(1) and (3). In the absence of any evidence on the security aspect the Court held that there was no evidence that the applicant has acted in any manner which is prejudicial to security.

[3] The purpose of s. 8 of the Internal Security Act is to detain a person with a view to preventing him from acting in any manner prejudicial to the security of Malaysia. There must therefore be some evidence to suggest that the applicant is in a position to do something in the future which will affect the security of the country. There is absolutely no such evidence or suggestion thereof.

[Writ of habeas corpus issued to release applicant forthwith.]

Cases referred to:
Council of Civil Service Unions & Others v. Minister of the Civil Service [1984] 3 All ER 935
John Peter Berthelsen v. Director-General of Immigration, Malaysia & 2 Ors.[1986] CLJ (Rep) 160

Legislation referred to:
Internal Security Act 1960, ss. 8, 71(3), 73, (1), (3)(a), (b), (7)

For the applicant - G. Sri Ram (S.C.. Loh & S.S. Ma with him); M/s. Sri Ram, Zulkifly & Kumar
For the respondent - T. Selventhiranathan, SFC (Zaleha Zahari, SFC, with him)

[Editor's Note: The respondent's appeal to the Supreme Court was dismissed with costs on 3 November 1987 (Coram: Salleh Abas LP Malaysia, Hashim Yeop Sani SCJ & Wan Hamzah SCJ)]

JUDGMENT

Harun Hashim J:

The applicant was a director of the Perwira Habib bank and a member of its loans committee from October 1975 to August 1985. At all material times, the applicant was and still is the managing director of Malayan Commercial Services Sdn. Bhd., a company providing consultancy services which he jointly owns. It is alleged that whilst the applicant was a member of the loans committee of the bank, he provided consultancy services through his company which resulted in the loans committee approving large sums as loans to various parties, thereby causing the bank to suffer substantial losses.

During the first week of January 1987, the commercial crimes branch of police headquarters at Bukit Aman, Kuala Lumpur was investigating into possible offences of criminal breach of trust of monies belonging to Perwira Habib bank during the applicant's tenure as director of the bank. The applicant was interviewed by the police for a period of three days in connection with these investigations.

On 13 January 1987 at about 11.00 a.m. the applicant was arrested by a deputy superintendent of police attached to the special branch of police headquarters, Bukit Aman, Kuala Lumpur at his office under s. 73(1) of the Internal Security Act (ISA) and subsequently detained under s. 73(3)(a) & (b) of the ISA. It is against this detention that this application for a writ of *Habeas Corpus* be issued.

At the time of his arrest the applicant was informed that the reason for the arrest was because the police officer believed that there are grounds which would justify his detention under s. 8 of the ISA and that he had acted in a manner prejudicial to the security of the country.

According to the police officer he had "reason to be believe that the substantial losses suffered by the bank caused by the manner in which loans were approved by the loans committee to certain parties, particularly through the acts of the applicant, has evoked feelings of anger, agitation, dissatisfaction and resentment among members of the armed forces and it is likely that such feelings may be ignited and lead to their resorting to violent action and thereby affect the security of the country."

All servicemen in the armed forces who do not qualify for pension are required by law to contribute to the Tabung Angkatan Tentera. The board of this fund holds 46.48 per cent of the shares of the Bank. It is the contention of the deputy superintendent that it is because of this substantial ownership of the bank's equity and the related losses that members of the armed forces are likely to resort to violent action. On a percentage basis the equity may be substantial, but no evidence was given as to the percentage of the fund that is invested in the bank or the amount of money involved. Be that as it may apart from the bare assertion of the arresting officer that members of the armed forces are likely to resort to violent action, there was absolutely no evidence before the Court that the acts of the applicant are prejudicial to the security of Malaysia. It will be recalled that he had ceased to be a director of Perwira Habib bank in August 1985 and holds no position in any organisation that will enable him

to act or is able to act or likely to act in any manner prejudicial to the security of Malaysia. It follows that any threat to security must relate to his past acts prior to August 1985. He is certainly in no position to organise anything or instigate anyone to violent action. At most his personal safety may be in danger but this is not a case of protective custody.

Section 73(7) ISA reads:

> Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar places authorised generally or specially by the Minister.

This provision does not mean a complete ouster of the Court's jurisdiction to issue a writ of *habeas corpus* because it is settled law that any exercise of power under a statute is subject to judicial review to ensure that the scope and limits of the power were not exceeded: see *Council of Civil Service Unions & Others v. Minister of the Civil Service* [1984] 3 ALL ER 935. The effect of the provision, however, is that the burden of proof shifts to the applicant to show that the detention is unlawful. I therefore cannot accept the contention of Mr. Selventhiranathan that once a person is arrested and detained under s. 73(1) & (3) he has no recourse to the Courts until a detention order is issued by the Minister under s. 8. The main thrust of the applicant's case is that whatever offences he may be alleged to have committed are purely criminal in nature and there are adequate provisions under the Criminal Procedure Code to investigate the alleged offences and prosecute him in Court in the normal way. Further, all documents seized by the police during his arrest relate to comply matters and commercial dealings and none of a subversive nature or in any way involving national security.

On these facts, it is for the respondent to show that he has not exceeded his powers under s. 73(1) & (3). The respondent attempted to do this through the affidavit of the arresting officer. In *John Peter Berthelsen v. Director-General of Immigration, Malaysia & 2 Ors.* [1986] CLJ (Rep) 160, the Supreme Court at p. 166 said:

> We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere *ipse dixit* of the first respondent to that effect in the notice of cancellation of the employment pass which the learned Judge purported to accept without more ado.

In the present case, in the absence of any evidence on the security aspect, I held that there was no evidence that the applicant has acted in any manner which is prejudicial to security. It may well be that there is such evidence but it must be disclosed to the Court, albeit confidentially even on a need-to-know basis, to enable the Court to be satisfied that the arrest and detention of the applicant under s. 73 is justified in the circumstances. It is not necessary to disclose the sources of the information which the police have. It will be sufficient to disclose the nature of the information.

Finally, it is to be observed that an arrest and detention under s. 73(1) has two limbs, *viz:*

(a) Grounds which would justify detention under s. 8; and

(b) That the applicant has acted in any manner prejudicial to the security of Malaysia (on the facts applicable to this case)

The purpose of s. 8 is to detain a person with a view to **preventing** him from acting in any manner prejudicial to the security of Malaysia. There must therefore be some evidence to suggest that the applicant is in a position to do something in the future which will affect the

security of the country. There is absolutely no such evidence or suggestion thereof. The only evidence, if at all, is the suggestion that his past acts are prejudicial to the security of the country. This is not enough as both limbs of s. 73(1) must be satisfied.

I accordingly issued the writ to release the applicant forthwith.

Also found at [1987] 2 CLJ 470